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No. 87-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE NORWEGIAN AMERICAN CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEST AVAILABLE COPY

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CONSENT OF PARTIES

Amicus Curiae has filed this brief with the consent of Appellants and Appellees. Letters of Consent have been filed with the Clerk of the Court.

Interest of Amicus

The Norwegian American Chamber of Commerce, Inc. ("NACC") is a New York not-for-profit corporation established over seventy years ago. Its objectives include the following: "To foster trade, business, financial or professional interests, including the interests of those having common trade, business, financial or professional interests; to protect against oppressive or unlawful commercial practices; to secure freedom from unjust or unlawful imposts; to disseminate accurate and reliable information as to the standing of merchant and other matters; to procure uniformity and certainty in the customs and usages of trade and commerce; to settle differences between its members; and to promote an enlarged and friendly intercourse between businessmen. These activities are to be concerned primarily with commerce between Norway and the United States of America."

The headquarters of the organization, which has chapters throughout the United States and in Norway, are at 825 Third Avenue, New York, New York 10022. The membership of over 1200 includes corporations, individuals and associations, all of whom have a concern for peaceful international trade, particularly between the United States and Norway. Freedom of international trade is of particular importance to Norway which not only has a large fleet under the Norwegian flag but also has tonnage beneficially owned and insured by its nationals under "flags of convenience", as does the United States, such as those of Panama, Liberia, etc. The IVER CHASER, a Liberian flag vessel, is managed by Iver Bugge Management A/S of Larvik, Norway. A United States citizen has beneficial ownership in the Petitioner corporation as do Norwegian citizens. The insurer is Norwegian.

The NACC is concerned that the decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York in this case may be construed internationally as giving United States at least tacit approval of actions which would jeopardize international trade and deny the right of compensation for clearly foreseeable damages inflicted by perhaps overzealous Government agents in executing policy decisions.

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REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The modern world has been horrified by the wanton damage currently being inflicted upon shipping by the mining and bombing activities in the Iran-Iraq conflict and earlier during the 1982 Falklands War. See Amerada Hess Shipping Corporation v. Argentine Republic (hereinafter "Amerada Hess"), 830 F.2d 421 (2d Cir. 1987), petitions for rehearing denied, Nos. 86-7602, 86-7603, (Nov. 18, 1987), referred to beginning at page 2 of Petitioners' Supplemental Brief. The equally shocking mining of Nicaraguan waters by agents of the U. S. Government without adequate warning to international shipping was held to be violative of international law by the International Court of Justice, 1986 I.C.J. 14 (see pages 6, 7 and 26 of the Petition herein). A refusal by this Court to review the decisions below

denying the vessel owners and insurers the right to press their claim for clearly foreseeable consequences of the acts of agents of the U. S. Government would further shock the civilized world.

Use of the "political question" argument to avoid deciding a genuine legal question presented by a party with proper legal standing is a practice, however often utilized in recent years by Federal judges, which is not in accordance with the duty of judges "to say what the law is", Marbury v. Madison, 5 U. S. (1 Cranch) 137, 177 (1803). As stated by E. Gordon in "American Courts, International Law and 'Political Questions' which Touch Foreign Relations", 14 Int'l Law. 297, 329 (Spring 1980), it is time ". . . for the courts to rethink the implications which the political question doctrine holds for constitutional government - and

for the place of international law in the American judicial process."

ARGUMENT

I. WHERE, AS HERE, THE ACTS OF U. S. AGENTS WERE TORTIOUS AND UNLAWFUL, EVEN THOUGH IN FURTHERANCE OF AN EXECUTIVE POLICY DECISION, THE "POLITICAL QUESTION" DEFENSE SHOULD NOT BE ALLOWED INSULATE THE GOVERNMENT FROM LIABILITY FOR DAMAGE RESULTING FROM SUCH ACTS.

As pointed out by the Center for Constitutional Rights (Amicus Brief, pp. 7-8), liability arises where an entirely proper activity, such as road repairs or railroad operations, has been accompanied by failure to warn of danger. For example, the United States has been held liable for damages resulting from failure to warn of newly-waxed floors in a post office, Moenck v. United States, 264 F. Supp. 165 (D. C. Iowa 1966), or because of improper labels on a package of explosives (Williams v. United States, 352 F.2d 477

(5th Cir. 1965). In this case, the bases for liability of the United States are the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680 and the Suits In Admiralty Act, 46 U.S.C. § 741 et seq. and the specific acts complained of are those of U.S. Government agents or employees, discussed in the Petition herein. That such persons were really involved is no longer in question.

See page 36 of the Report of the Congressional Committees investigating the Iran-Contra Affair, pub. Nov. 13, 1987, Union Calendar No. 277, 100th Congress, 1st Session, H. Rep. No. 100-433, S. Rep. No. 100-216, which states categorically "On January 7 [1984], three magnetic mines were placed in Sandino Harbor; on February 3, an air attack destroyed a Sandinista communications and naval arms depot, and on February 29 more mines were placed at Corinto." It was obviously one of the

mines at Corinto which damaged the IVER CHASER on March 28. There would have been plenty of time in which to issue warnings, and if such had been done, the IVER CHASER would not have been damaged. See also the article by Seymour M. Hersh in his New York Times Magazine, "Who's in Charge Here?" on Sunday, November 22, 1987 which states at page 62, a U. S. Army unit was involved in the supply of "small boats used by the C.I.A. to mine harbors" in Nicaragua and an Army helicopter mechanic "was aboard the C.I.A. ship that directed the 1983 mining of harbors inside Nicaragua, an action subsequently adjudicated by the World Court at The Hague to be a violation of international law."

The United States holds itself out to be a model of fairness and an adherent of international law. Refusal by this Court to review the decisions below in this case could be viewed as at least tacit

approval at the highest level of actions condemned by the World Court at The Hague to be in violation of international law: nations of the world could then well ask, "Since the United States can do it, why can't we do it - or something similar - too?"

In its Brief Amicus, the Center for Constitutional Rights avers that the theory espoused by the courts below would, if it became the general rule, "make the United States the most lawless player in the international arena" (p. 13). As also stated by the Center for Constitutional Rights (p. 14), "To mine the harbors of a country with which the United States is not at war - whether with or without notice to international shipping - is to act as if there were no international law."

II. THE PRESENT "DOUBLE STANDARD" APPLIED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN ITS HANDLING OF THIS CASE AND THE RECENT CASE OF AMERADA HESS SHIPPING CORPORATION V. ARGENTINE REPUBLIC REQUIRES THAT CERTIORARI BE GRANTED.

As pointed out in Petitioners' Supplemental Brief dated October 2, 1987, Amerada Hess and this case involve alleged violations of "settled principles of international law" by employees or agents of the respective governments and each involves claims for a tort only. In Amerada Hess, the Court of Appeals for the Second Circuit on September 11, 1987 properly reversed a District Court decision dismissing a suit for damages by a United States interest Liberian tanker owner against the Argentine Republic under facts strikingly similar to those in this Petition which involves dismissal of a suit for damages by a Norwegian interest Liberian tanker against the United States. Is it merely coinci-

dental that the suit against the United States was dismissed and jurisdiction over the suit against the Argentine Republic retained? The world at large would have trouble accepting that! And lawyers, familiar with the "policy question", know that use of this doctrine to avoid deciding a case where a genuine legal question is duly presented to a court of competent jurisdiction is contrary to the rationale of Marbury v. Madison, supra. Furthermore, as stated at page 15 of the Brief Amicus by the Center for Constitutional Rights, resort to this doctrine would "lend credence to the noxious myth that 'in their external relations sovereigns are bound by no law'" (see Occidental of Umm v. A Certain Cargo, 577 F.2d 1196, 1204 (5th Cir. 1978).

III. IT IS IMPORTANT THAT THIS COURT AFFIRM THE OBLIGATION OF ALL GOVERNMENTS, INCLUDING THAT OF THE UNITED STATES OF AMERICA TO RESPECT INTERNATIONAL LAW.

A decision of this Court that could be construed to give at least tacit approval to the mining of either international waters or of waters of non-belligerent nations would be a blow to the development of freedom of international commerce. Even the United States by implication recognizes this fact, albeit in a different but sufficiently analogous situation. See the United States Brief as Amicus Curiae in Support of the Argentine Republic's Petition for Rehearing en banc in the Amerada Hess case, filed October 19, 1987 at page 4: "the United States does not condone violations of international law by sovereign states and considers that Argentina should bear responsibility for

its actions that are the subject of the instant litigation . . . "

The practical effect of a denial of the Petition herein could be interpreted by the world community as an unwillingness to face the consequences with respect to the legal consequences of unlawful and tortious execution of executive policy decisions under the guise of the "political question" defense. For the United States to be seen in such a light would be harmful to international commerce and to the moral standing of the United States.

CONCLUSION

For the reasons set forth above in the Petition dated September 4, 1987, the Supplemental Brief dated October 2, 1987, and in the Brief Amicus of the Center for Constitutional Rights dated November 9, 1987, the Petition for Certiorari should be granted and the judgment of the Second Circuit reversed.

Respectfully submitted,

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